No. 95-1858

In The

Supreme Court of the United States

October Term, 1996

DENNIS C. VACCO, ET AL.,

Petitioners,

v.

TIMOTHY E. QUILL, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF THE AMERICAN LIFE LEAGUE, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS*

Amicus curiae, American Life League, Inc., is a District of Columbia corporation, with its office in Stafford, Virginia, recognized under 26 USC § 501(c)(3) as a tax-exempt organization. The *Amicus* is a social welfare and educational organization, incorporated in 1981, with some 300,000 active supporting families across the country.

The *Amicus* researches and publishes a magazine, newsletters, brochures and other material relating to the human rights of persons born and preborn; sponsors, and participates in, symposia and other public and invitational means of discussion and education; monitors, and reports upon, pertinent state and federal administrative, legislative, and judicial developments; and otherwise seeks to fulfill the mandate of its Articles of Incorporation and the concerns of its supporters. Its professional and volunteer staff includes those experienced in the fields of medicine, science, public policy, theology and law, and other persons who are, or who have become, cognizant in areas of factual and interpretive knowledge as to biological, theological, philosophic, legal, political and economic aspects of the rights of persons born and preborn.

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* The parties to the present case have consented to the filing of this brief; letters granting consent are being submitted with this brief.

SUMMARY OF ARGUMENT

This case presents a challenge to various sections of the New York Penal Law making it a crime to aid a person in committing suicide or attempting to commit suicide. The lower court struck down the New York laws as violative of the United States Constitution because these laws lack any rational basis and violate the equal protection clause of the fourteenth amendment. *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996). The lower court held that the New York laws do not treat similarly circumstanced persons alike in that those in the final stages of terminal illness who are on life support systems are allowed to be killed by the removal of such systems, but those who are similarly situated, except for previous attachment to the life support systems, are not allowed to be killed by self-administering prescribed drugs. Further, the court held that New York does not have any apparent interest in requiring the prolongation of a life that is all but ended.

The lower court's equal protection analysis is incorrect. Contrary to the lower court's decision in *Quill*, it violates the equal protection guarantee of the fourteenth amendment for a state to protect innocent non-aggressor persons in general by prohibiting their intentional killing as homicide, and then to carve out an exception to that protection so as to allow some such persons to be intentionally killed. The equal protection guarantee demands that "No state shall . . . deny to *any person* the equal protection of the laws." U.S. Const. XIV amend., § 1 (emphasis added).

In addition to deciding this case, this court should reconsider its decision in *Cruzan v. Director, Missouri*

Department of Health, 497 U.S. 261 (1990), since both decisions, as well as *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc), allow the intentional killing of innocent, non-aggressor persons. By prohibiting the intentional killing of innocent non-aggressor persons in general, a state violates the equal protection clause to carve out an exception to that protection so as to allow some such persons to be intentionally killed. Furthermore, when a state excludes any class of innocent non-aggressor persons from its general prohibition against intentional killing, it steps upon a slippery slope leading predictably to the involuntary killing of the unwanted.

It is possible, however, for the law to protect patients against intentional killing without interfering with proper medical decisions. There comes a time when a person has done all that is reasonably required of him to preserve and prolong his life, nature should be allowed to take its course, and the proper judgments of physicians and family should be respected. In this context, a person should be allowed to die a natural and dignified death. Such cases are not now before this court. Rather, since the situations in *Quill*, *Compassion in Dying*, and *Cruzan* all involve the intentional killing of innocent non-aggressor persons, this court should reject the holding and reasoning in *Quill*, as well as of *Compassion in Dying*, and should reconsider its holding in *Cruzan*. This court ought to reaffirm the basic entitlement to equal protection against intentional killing.

ARGUMENT

I. IT VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE FOURTEENTH AMENDMENT FOR A STATE TO PROTECT INNOCENT, NON-AGGRESSOR PERSONS IN GENERAL BY PROHIBITING THEIR INTENTIONAL KILLING AS HOMICIDE, AND THEN TO CARVE OUT AN EXCEPTION TO THAT PROTECTION SO AS TO ALLOW SOME SUCH PERSONS TO BE INTENTIONALLY KILLED.

The basic issue presented in this brief was capsulized by Justice Stevens in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 779 (1986) (Stevens, J., concurring), where he stated that "the permissibility of terminating the life of a person could scarcely be left to the will of the state legislatures." *See also Roe v. Wade*, 410 U.S. 113, 157 n.54 (1973). In *Roe v. Wade*, the court conceded that if "the fetus is a 'person' within the language and meaning of the fourteenth amendment . . . the appellant's case, of course, collapses." *Id.* at 156. The governing principle here is that a fourteenth amendment "person" does not hold his life subject to the will of the legislature as to whether another shall be legally permitted to kill him.[1]

The fourteenth amendment provides: "No state shall . . . deny to *any person* the equal protection of the laws."

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[1] *Roe v. Wade* held that the preborn child is not a fourteenth amendment "person," whether or not he is a human being. *Roe's* recognition of the right to kill the preborn nonperson has an obvious bearing upon the subsequent allowance by courts of intentional killing in the "right-to-die" context. However, an examination of *Roe* itself is beyond the scope of this brief.

U.S. Const. XIV amend., § 1 (emphasis added). In *Cruzan* and *Quill*, as well as *Compassion in Dying*, the patients involved are all "persons" within the meaning of the fourteenth amendment. They are all innocent non-aggressors. Clearly, if the fourteenth amendment guarantee of equal protection means anything, it must mean that such persons cannot be excluded from the protection of state homicide laws by permitting them to be intentionally killed by others in any situation. Yet, the courts' decisions in all three cases allowed precisely that.

" 'The life of those to whom life has become a burden – of those who are hopelessly diseased or fatally wounded – nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment and anxious to continue to live.' " *Cruzan*, 497 U.S. at 295 (Scalia, J., concurring) (quoting *Blackburn v. State*, 23 Ohio St. 146, 163 (1873)). Furthermore, " 'The lives of all are equally under the protection of the law, and under that protection to their last moment. . . . [Assisted suicide] is declared by the law to be murder, irrespective of the wishes or the condition of the party to whom the poison is administered. . . . ' " *Id.* (quoting *Blackburn*, 23 Ohio St. at 163). The right to life is the most basic right, since death forecloses "the right to have rights." *See Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring). As Representative Joshua R. Giddings put it:

> Our fathers, recognizing God as the author of human life, proclaimed it a "self-evident" truth that every human being holds from the Creator an inalienable right to live . . . .

> . . . If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, that *all men*, without respect to complexion *or condition*, hold from the Creator the right to live, who shall determine what portion of the community shall be slain? And who may perpetrate the murders?

Cong. Globe, 35th Cong., 1st Sess. App. 65-66 (1858) (second emphasis added).

Representative Thaddeus Stevens summarized the principle:

> This is man's Government; the Government of all men alike; not that all men will have equal power and sway within it. Accidental circumstances, natural and acquired endowment and ability, will vary with fortunes. But equal rights to all the privileges of Government is innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits.

Cong. Globe, 39th Cong., 1st Sess. 74 (1865).

Similarly, Representative John A. Bingham, author of section one of the fourteenth amendment, declared, with reference to the fifth amendment, the principle he viewed as fundamental:

> [T]he Constitution of the United States . . . declared that "no person shall be deprived of life, liberty, or property without due process of law." By that great law of ours it is not inquired whether a man is "free" by the laws of England; it is only to be inquired *is he a man*, and therefore free by the law of that creative energy which breathed into his nostrils the breath of

> life, and he became a living soul, endowed with the rights of life and liberty. . . .
>
> Before that great law *the only question to be asked of a creature claiming its protection is this: Is he a man?* Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal.

Cong. Globe, 40th Cong., 1st Sess. 542 (1867) (emphasis added). Senator Allen G. Thurman stated that a state may not deny equal protection to "any person" in the jurisdiction, "be he sane or be he insane, be he old or be he young, be he innocent or be he criminal, be he learned or be he ignorant." 3 Cong. Rec. 1794 (1875). And as Justice Brennan put it in another context,

> At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death.

Furman, 408 U.S. at 296 (Brennan, J., concurring).

In summary, since the right to life is the indispensable right, it violates the equal protection of the laws for a state to deny to some innocent non-aggressor persons the protection against intentional deprivation of that right which it provides to such persons in general.

II. IN DECIDING THE *QUILL* CASE, THIS COURT SHOULD RECONSIDER *CRUZAN*, SINCE BOTH DECISIONS, AS WELL AS *COMPASSION IN DYING*, ALLOW THE INTENTIONAL KILLING OF INNOCENT, NON-AGGRESSOR PERSONS.

It is essential to note, first, what these cases do *not* involve. They do not involve the difficult decisions as to the withholding or withdrawal of medical treatment that is arguably burdensome, dangerous, extraordinary or disproportionate to the expected outcome. The law, which is a blunt instrument, can have only a limited role in such cases. Such cases are not now before this court. Rather, our concern is with cases involving actions by third persons taken with the specific intention of causing the death of the patient in question. *Cruzan* involved the withdrawal of food and water provided by tube, the provision of which was not burdensome, dangerous, extraordinary, or disproportionate to the expected outcome, from an incompetent patient. The nutrition and hydration were withdrawn with the specific intent of causing Nancy Cruzan's death with the purpose of carrying out her own desire to have them withdrawn and to die. In *Quill* and *Compassion in Dying*, the courts approved the administration of lethal agents with the same intention and purpose.

The distinction between passive and active killing, as noted by Justice Scalia in his concurrence in *Cruzan* is not helpful. *Cruzan*, 497 U.S. at 296-97 (Scalia, J., concurring). Starving a person to death, as the "caregivers" of Nancy Cruzan did to her, is no different from putting a gun to her temple and squeezing the trigger. As a matter of fact,

the latter method is probably less painful to the victim.[2] If Nancy Cruzan had miraculously sat up in her hospital bed and handed a gun to her "caregiver" and the "caregiver" killed Nancy, there would have been a trial for homicide. The fact that the "caregivers" chose to starve Nancy to death should be of no consequence in the eyes of the law. Courts have upheld convictions of parents for statutory manslaughter for negligently failing to supply their child with necessary medical attention which results

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[2] In a note to his opinion in *Brophy v. New England Sinai Hospital, Inc.*, 497 N.E.2d 626, 641, n.2 (Mass. 1986) (Lynch, J., dissenting), Justice Lynch recounted the physical hardship which the evidence in the case showed to be normally associated with starvation and dehydration:

> Removal of the G. tube would likely create various effects from the lack of hydration and nutrition, leading ultimately to death. Brophy's mouth would dry out and become caked or coated with thick material. His lips would become parched and cracked. His tongue would swell, and might crack. His eyes would recede back into their orbits and his cheeks would become hollow. The lining of his nose might crack and cause his nose to bleed. His skin would hang loose on his body and become dry and scaly. His urine would become highly concentrated, leading to burning of the bladder. The lining of his stomach would dry out and he would experience dry heaves and vomiting. His body temperature would become very high. His brain cells would dry out, causing convulsions. His respiratory tract would dry out, and the thick secretions that would result could plug his lungs and cause death. At some point, within five days to three weeks his major organs, including his lungs, heart, and brain, would give out and he would die.

Id.

in the death of the child. *State v. Williams*, 484 P.2d 1167 (Wash. Ct. App. 1971). Simply put, *Cruzan*, *Quill*, and *Compassion in Dying* are all cases dealing with the intentional killing of an innocent person who cannot in any way be described as an aggressor. In the assisted suicide cases, whether the doctor feeds the patient the poison or prescribes it, the intent of his act is to kill the patient. Some may attempt to distinguish cases where the victim has been declared "terminally ill." However, the attempt to make that distinction reinforces our equal protection argument. The law should not provide lesser protection to an innocent person, with respect to the indispensable right to life, merely because he or she has been defined as terminally ill. To do so is a violation of equal protection and therefore unconstitutional.

When a state protects innocent, non-aggressor persons in general by forbidding them to be intentionally killed by another, it would deny equal protection of the law for the state to exclude from that protection some such persons because they are terminally ill or because they have asked to be killed. *Cruzan*, *Quill*, and *Compassion in Dying* do not involve the question of whether a competent person has a constitutional right to commit suicide by his own unassisted hand. Apart from the incongruity that would be involved in a state trying to impose a criminal penalty on a person who successfully kills himself by his own hand, the state clearly has constitutional authority to forbid a person to attempt suicide by his own hand. *See Cruzan*, 497 U.S. at 298-300 (Scalia, J., concurring). Otherwise, one would have to affirm a constitutional right to alienate the unalienable right to life. However, the limited issue involved in *Cruzan*, *Quill*, and

Compassion in Dying is the question of whether the state may rightly withdraw criminal sanctions from a person who intentionally kills another because the victim has consented to his own homicide.

> Generally, it may be said that consent by the victim is not a defense in a criminal prosecution. The explanation most commonly given for this rule is that a criminal offense is a wrong affecting the general public, at least indirectly, and consequently cannot be licensed by the individual directly harmed. Thus, it is no defense to a charge of murder that the victim, upon learning of the defendant's homicidal intentions, furnished the defendant with the gun and ammunition.

Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* 408 (1972) (footnotes omitted). In such cases, it would violate the equal protection clause for the state to exclude such persons from the protection of the general prohibition against homicide. Therefore, this court should not only reverse the judgment in *Quill*, and also in *Compassion in Dying*, but it should also reconsider its decision in *Cruzan*.

III. WHEN A STATE EXCLUDES ANY CLASS OF INNOCENT, NON-AGGRESSOR PERSONS FROM ITS GENERAL PROHIBITION AGAINST INTENTIONAL KILLING, IT STEPS UPON A SLIPPERY SLOPE LEADING PREDICTABLY TO THE INVOLUNTARY KILLING OF THE UNWANTED.

For a state to allow the intentional killing of certain innocent human beings is ultimately to subject the value of life to utilitarian considerations and to deny the very

humanity and dignity of the human person.[3] The slippery slope arguments have been made elsewhere,[4] and the

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[3] The Missouri State Supreme Court in *Cruzan v. Harmon*, 760 S.W.2d 408, 422 (Mo. 1988), *aff'd sub nom. Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), observed that the argument "that Nancy will not recover, is but a thinly veiled statement that her life in its present form is not *worth living*. Yet a diminished quality of life does not support a decision to cause death." (emphasis added).

[4] *See* Yale Kamisar, *When Is There A Constitutional "Right to Die"? When Is There* No *Constitutional "Right to Live"?*, 25 Ga. L. Rev. 1203, 1206 (1991) (arguing that in the euthanasia context "[w]e have *moved down* the slippery slope a considerable distance; we have *seen* the slippery slope"); Leo Alexander, M.D., *Medical Science Under Dictatorship*, 241 New Eng. J. Med. 39 (1949). Dr. Alexander observed,

> Whatever proportions these crimes [of the Nazi euthanasia program] finally assumed, it became evident to all who investigated them that they had started from small beginnings. The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians. It started with the acceptance of the attitude, basic in the euthanasia movement, that there is such a thing as life not worthy to be lived. This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually the sphere of those to be included in this category was enlarged . . . . But it is important to realize that the infinitely small wedged-in lever from which this entire trend of mind received its impetus was the attitude toward the non-rehabilitable sick.

Id.; see also Joseph R. Stanton, M.D., *The New Untermenschem*, Hum. Life Rev., Fall 1985, at 77, 82 (noting that Dr. Alexander, shortly before his death, commented in 1984 on the situation in the United States: "It is much like Germany in the 20's and 30's – the barriers against killing are being removed").

decisions in *Quill* and *Compassion in Dying* confirm those apprehensions.

One can discern in these and other "right-to-die" cases a path leading toward involuntary, enforced euthanasia. The decisions and rhetoric in *Cruzan*, *Quill*, and *Compassion in Dying* bring to mind the arguments for euthanasia made in 1920 by Dr. Karl Binding and Dr. Alfred Hoche in *The Release of the Destruction of Life Devoid of Value*. Doctors Binding and Hoche wrote:

> By death with dignity, we don't mean only the right to death with dignity, but much more, the legally acknowledged right to the complete relief of an unbearable life. . . .
>
> Realizing that there is indeed human life whose continuation is of no interest to any reasonably thinking person, then it [sic] up to the legislature to ask this fateful question: "Is it our duty to continually defend this unsocial life by giving it full protection of the law or is it our duty to release it for euthanasia?" You could also pose this question from a legal point of view: Shall we prefer to see the continued support for this kind of life as an example of the sacredness of life or shall we consider the legalization of the mercy killing, so relieving for all those involved, as the smaller evil. . . .
>
> There is no point of view, not legal, social, moral nor religious which presents a good reason for failure to legalize the euthanasia of those persons desperately desiring death with dignity by those who are apt to do so. I consider this release or legalization a simple duty of justified compassion. We often apply compassion to various cases.

Karl Binding & Alfred Hoche, *The Release of the Destruction of Life Devoid of Value* 14-20 (Robert L. Sassone, 1975) (1920).

In the aftermath of *Cruzan*, *Quill*, and *Compassion in Dying*, how long will it be before some court will decide that the decision of an elderly, infirm person not to accept assisted suicide is evidence that he is legally incompetent to make such a decision – for is it not wholly irrational for a person with such a low quality of life to want to live? So therefore the decision must be made for him, for his own good of course. Significantly, arguments are currently made for the rationing of health care based on "fixed categories of patients."[5] And added pressures from the monitoring of physician's decisions by insurance companies, and the rising costs of Social Security and Medicare are moving society toward the adoption of a "regulated life span" with the prospect of enforced euthanasia.[6]

The legalization of intentional killing involved in *Cruzan*, *Quill*, and *Compassion in Dying* will predictably result in unacceptable consequences; for example, as noted by Thomas J. Marzen, et al., "if the 'right to die' recognized in present case law were deemed to encompass a 'right to suicide,' then suicide by substituted judgment – constitutionally sanctioned, active, involuntary euthanasia – of incompetent persons would be a logical

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[5] Charles L. Sprung, M.D., J.D., *Changing Attitudes and Practices in Forgoing Life-Sustaining Treatments*, 263 J. Am. Med. Ass'n 2211, 2214 (1990).

[6] Paul Craig Roberts, *Next, The Regulated Life Span?*, Wash. Times, April 10, 1990, at F3.

consequence." Thomas J. Marzen, et al., *Suicide: A Constitutional Right?*, 24 Duq. L. Rev. 1, 102 (1985). As Marzen notes:

> Any attempt to limit this "right to suicide" to certain persons or circumstances, for example to persons who are terminally ill or elderly, would conflict with the "freedom of choice" or privacy theory that is advanced to assert the existence of such a "right" in the first place. . . .
>
> The young woman tragically disappointed in love, the middle-aged man who has lost his family and whose career has been destroyed, the depressed teen, and the person of any age who has been severely disabled, all might well believe that they ought to be able to exercise this "right" with the same freedom as the person who is terminally ill or older. . . . [T]here is nothing in the Constitution that would limit the existence of a right it acknowledges in such a selective and arbitrary fashion [as to apply only to terminally ill or elderly persons].

Id. at 102-03.

Further, as Yale Kamisar notes:

> There is another reason I very much doubt that the right to assisted suicide could or would be limited for very long to persons who are terminally ill – the force of reasoning contained in the analysis of [*Quill* and *Compassion in Dying*] that handed down the right to die decisions I discussed earlier. Both the Second and Ninth Circuits seemed to agree with those proponents of assisted suicide who maintain there is no principled difference in terms of constitutional doctrine and precedent between the alleged right to

assisted suicide and the established right to terminate life support. The problem is that the right to reject life-sustaining treatment has not been limited to terminally ill people.

One need only recall the *Elizabeth Bouvia* case, which arose a decade ago. At the time of the litigation, Ms. Bouvia, a young woman afflicted with severe cerebral palsy, had a long life expectancy. Nor was she unconscious or mentally impaired. Indeed, the court described her as both "intelligent" and "alert." Nevertheless, she was granted the relief she sought – the right to remove a tube keeping her alive against her wishes.

To be sure, neither the *Bouvia* case nor other cases upholding the right of nonterminally ill persons to reject life-sustaining treatment were decided by the U.S. Supreme Court. But *Bouvia* and these other cases have been well received by bioethicists and medicolegal commentators. . . .

If the Second Circuit is right about terminally ill patients being "similarly situated" *whether or not* they are on life support, does it not follow that patients suffering from the same *nonterminal* illness are also "similarly situated," regardless of whether they are on life support? If the Second Circuit's equal protection analysis is sound, how can we prevent persons suffering serious but not terminal illnesses from enlisting the aid of another to die by suicide when patients with the same nonterminal illnesses *who are on life support systems* may hasten their deaths by directing the removal of such systems? Are not the "similarly circumstanced"

group of nonterminally ill patients *off* life support systems being denied equal protection?

Yale Kamisar, *The Reasons So Many People Support Physician-Assisted Suicide – And Why These Reasons Are Not Convincing*, 12 Issues in L. & Med. 113, 129-30 (1996).

For the law to recognize a right to assisted suicide for those defined as "terminally ill" would invite the development of loose criteria defining those who fall within this category. Despite the court's contention in *Quill*,[7] no doctor can say with certainty how long a person may live. Taken to its logical extreme, in the end, are we not all "terminally ill"?

There is reason to expect that the creation of a fundamental right to assisted suicide, or the creation of a right to assisted suicide based on equal protection principles, will result in constitutionally sanctioned active, involuntary euthanasia. While Dr. Alexander observed in 1984 that the situation in the United States regarding the value of human life was approaching that of Germany in the 20's and 30's, *see supra* note 4, this court today has the opportunity to reconstruct some of the fallen barriers against the intentional killing of innocent human life. As a result, this court should reaffirm the fundamental precept of the equal protection clause and require state laws that generally prohibit homicide to protect all innocent non-aggressor persons. No innocent, non-aggressor can be rightfully exempted from the protection of state homicide laws on account of a utilitarian notion of human life.

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[7] See the discussion regarding the definition of "terminally ill." *Quill*, 80 F.3d at 731.

Therefore, this court ought to reconsider *Cruzan* in light of these principles and in the context of *Quill* and *Compassion in Dying*.

IV. THE LAW CAN PROTECT PATIENTS AGAINST INTENTIONAL KILLING WITHOUT INTERFERING WITH PROPER MEDICAL DECISIONS.

A sound determination of "right-to-die" cases is difficult, but not impossible. It can be difficult to distinguish legitimate withholding or withdrawal of medical treatment, including termination of the administration of food and water that no longer sustains the life of a patient near death, from actions which are homicidal in intent. The law should not require that excessive treatment be given to impede the act of dying. There comes a time when a person has done all that is reasonably required of him to preserve and prolong his life, nature should be allowed to take its course, and the proper judgments of physicians and family should be respected. In this context, a person should be allowed to die a natural and dignified death.

In what situations, then, should the law interfere? We can safely enumerate two. First, it should do so in cases involving the circumstances presented in *Quill* and *Compassion in Dying*. These cases should be considered unlawful *per se* since they always involve the intentional killing of an innocent non-aggressor person. The fact that the patient is terminally ill is of no consequence. For example, if the physician were to shoot and kill a terminally ill patient only moments before the patient's death, the physician could be convicted for an unlawful homicide. As argued in this brief, where state law forbids the

intentional killing of innocent non-aggressor persons in general, a state may not carve out an exception for some such persons, such as those who are terminally ill or even imminently dying; to do so would violate the equal protection clause. Therefore, assisted suicide must be unlawful per se because it involves the intentional killing of innocent non-aggressor persons; it is of no consequence that the patient requests to be killed.

Second, the law should forbid the *Cruzan*-type case because it too involves unlawful, intentional killing. Three factors characterize such cases and help to illustrate this point:

1. The patient in the *Cruzan*-type case is *not dying or near death*. Nancy Cruzan, for example, had a life expectancy of 30 years;

2. These type cases *do not involve the withdrawal of medical treatment, including food and water provided by tube, that is burdensome, dangerous, extraordinary, or disproportionate to the expected outcome*. In *Cruzan*, the administration of food and water by tube was effective in sustaining Nancy Cruzan's life. It was therefore not useless even though it obviously would not correct her underlying condition; and

3. The action in question, the withdrawal of medical treatment, was taken with the *specific intent to cause the death* of the patient. The motive or purpose of the action may have been to relieve the patient of life considered burdensome or useless, but the clear and specific intent was to achieve that purpose by means of intentionally killing the patient. A permissible intention, on the other hand, would be to ease the

excessive pain *caused by the medical treatment itself.*

In these two classes of cases, assisted suicide and the *Cruzan*-type case, the law must protect the potential victims by providing to them the equal protection of the homicide laws. Other types of cases might be conjectured but they are not before the court today.

In summary, it is impermissible for a state to carve out an exception to the general protection of its homicide laws merely because a patient is considered terminally ill or because the patient's life is considered burdensome or useless, even when the patient has consented to be killed. Since the situations in *Quill, Compassion in Dying,* and *Cruzan* all involve the intentional killing of innocent non-aggressor persons, this court should reject the holding and reasoning of *Quill,* as well as of *Compassion in Dying,* and should reconsider its holding in *Cruzan.*

CONCLUSION

As Circuit Judge Calabresi noted in *Quill,* there is "no sign that . . . [a] 'culture of life' reigns in New York State – quite the contrary." *Quill,* 80 F.3d at 740 (Calabresi, J., concurring). This court, however, ought to reaffirm that the U.S. Constitution promotes the "culture of life" and rejects the "culture of death." This court ought to overrule *Quill,* and also *Compassion in Dying,* and ought to reconsider its decision in *Cruzan* so as to reaffirm the

basic entitlement to equal protection against intentional killing.

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